IN THE

# Supreme Court of the United States

October Term, 1960

No.

In the Matter of

ALBERT MARTIN COHEN,

*Petitioner,*

*v.*

DENIS M. HURLEY,

*Respondent.*

## BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*


DAVID SCRIBNER,
154 Nassau Street,
New York, New York,
*Counsel for National Lawyers Guild as Amicus Curiae.*

ABRAHAM UNGER,
HERMAN B. GERRINGER,
JONATHAN GOLDBERG,
*of Counsel.*

# INDEX



## Cases Cited

IN THE

# Supreme Court of the United States

**October Term, 1960**

**No.**

---

In the Matter of

ALBERT MARTIN COHEN,

*Petitioner,*

*v.*

DENIS M. HURLEY,

*Respondent.*

---

## BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

### The Interest of the National Lawyers Guild

The National Lawyers Guild, hereinafter referred to as "The Guild", a national bar association, deeply interested in the rules and standards governing the practice of law in the United States, submits this brief *amicus curiae* in support of the petitioner in the above entitled proceeding. The Guild deeply appreciates the opportunity made possible by the consent of counsel for both the respondent and the petitioner to present its views on the far-reaching issues involved.

Petitioner appeals from a judgment of the New York Court of Appeals affirming an order of the Appellate Division, Second Department, permanently disbarring him from the practice of law. Said disbarment was predicated upon a charge of "obstructing a judicial inquiry", such obstruction having consisted solely of asserting the privilege against self-incrimination in a judicially ordered inquiry

into improper solicitation. The Guild believes that the decision appealed from contravenes the Fourteenth Amendment both by denying due process of law to an attorney and by limiting the independence of the bar on which the right to counsel depends. The Guild recognizes the need to exclude from the bar those unable or unwilling to adhere to the high standards of professional practice which the administration of justice and the protection of the public from fraud and malpractice require. At the same time, the Guild recognizes that the administration of justice and the protection of the public cannot be secured by achieving laudable ends by dubious means.

## ARGUMENT

### POINT I

**A license to practice law may not be revoked unless the highest standards of due process are applied.**

A license to practice law is not held at the mercy of the state (*Schware* v. *Board of Law Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *ex parte Garland*, 4 Wall. 333; *ex parte Robinson*, 19 Wall. 505). The state may, of course, establish standards for the granting and retention of such a license, but it may not either by imposing impermissible standards or by refusing to license those who meet permissible standards exclude from its bar those who reasonably qualify.

There are two reasons why the lawyer is given this measure of protection. There is a general right to pursue a trade or calling after the requisite measure of time and effort has been invested in study and preparation (*ex parte Robinson, supra*), and there is the overriding social interest in an independent Bar, free to champion unpopular or disfavored as well as "respectable" causes. The Guild as a bar association wishes to address itself to this latter consideration.

It is a function of a lawyer in a free society to protect the rights of his client. If the client meets with popular or judicial antipathy the lawyer who champions him may find himself under attack. It is true that persecution of lawyers is rare, but the level of protection given to a lawyer who faces persecution must be measured by the level of protection given to a lawyer in the ordinary exigencies of practice. If a state can disbar a lawyer without proof of misconduct solely because he has refused to state under claim of constitutional privilege how he obtained three hundred and four (304) negligence cases, the same logic would allow a state to disbar a lawyer without proof of misconduct solely because he refused to state under similar claim how he obtained a single civil rights case. (The use of barratry statutes to intimidate civil rights lawyers is not new; see *Harrison* v. *National Association for the Advancement of Colored People*, 360 U. S. 167).

What the Appellate Division, acting as a licensing agency for lawyers, has done in the instant case is to require a lawyer to yield his membership at the bar upon his assertion of a constitutional privilege. Of course it did not couch its disbarment order in these terms. But the assertion of constitutional privilege is characterized as "obstruction of a judicial inquiry" and no other specification of "obstruction" is offered. Many constitutional rights are "obstructive" in nature starting with a writ of habeas corpus. That which is a shield to one man must be an obstruction to another. If a lawyer can be compelled to yield one of his "obstructionist" rights as a condition of his continued good standing at the bar, he may some day be required to yield others such as freedom from unreasonable search and seizure, the right to a specific statement of the charge put, and even the right to have counsel present at all stages of the inquiry (see *Sheiner* v. *Florida*, 82 Southern 2nd, 657, concerning opinion of Mr. Justice Floyd). The right to stand mute and force the accuser to come forward with charges and prove his case certainly should not be the first to go.

Nor can the measure of protection to which a lawyer is entitled with regard to his professional license be lowered by characterizing him "an officer of the Court" (see *Konigsberg* v. *State Bar of California*, 353 U. S. 252 at 273, citing *Cammer* v. *U. S.*, 350 U. S. 399). The lawyer, as indicated by the *Cammer* case, was never intended to be put in the same class as a law clerk or a bailiff.

The lawyer is not, by virtue of his professional position, hired and paid by a unit of government. His office cannot be abolished by the state. "In general he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business" (*Cammer* v. *U. S., supra*). He is expected to maintain a healthy independence so that he may stand, if necessary, between man and his sovereign.

The difference between the lawyer and the court clerk or bailiff is best illustrated by reciting the case of the lawyer on government payroll. Such a lawyer, like the clerk or bailiff, could have his employment terminated under innumerable circumstances, which would not justify disbarment (such as abolition of the job). Moreover, such a lawyer could be precluded as a condition of continued employment from engaging in certain types of political activity (see *United Public Workers* v. *Mitchell*, 330 U. S. 75); thus a limitation upon the exercise of a constitutional right is shown to be an incident of government employment rather than of professional character.

If an attorney for a governmental department were to refuse to respond to orderly inquiry on grounds of possible self-incrimination, he could be discharged from his employment solely because of his unresponsiveness (see *Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Education*, 357 U. S. 399; *Nelson and Globe* v. *County of Los Angeles*, 362 U. S. 1). But there is no basis for the assumption that such an individual could be deprived of his professional license and denied the right to engage in his chosen calling elsewhere.

In short, *Lerner* v. *Casey, supra; Beilan* v. *Board of Education, supra*, and other cases cited by the New York Court of Appeals in support of the proposition that refusal to testify on constitutional grounds warrants loss of position as "an officer of the Court" have no application to the lawyer. These cases apply to civil servants enjoying such statutory protection as the state has chosen to give them. The lawyer, on the other hand, derives his professional independence from the constitutional right to counsel; he is a class apart, required to take risks and protected in their taking because he, and the judicial system of which he is an integral part, can function in no other way.

## POINT II

**Courts, although possessing power to discipline lawyers, can exercise that power only under law. In this case, the Court has no power under law to act against this respondent, since there exists no law, rule, regulation or canon which subjects his conduct herein to disciplinary action.**

The Court has the power to conduct general investigations to promote the administration of justice. Out of such an investigation may come rules regulating practice and professional relationships with courts, clients and brother lawyers, such as the rule regulating contingent fees in negligence cases (see *Gair* v. *Peck*, 6 N. Y. 2d 97).

The Court also may conduct an investigation into one or another area of litigation, such as solicitation, in its supervisory capacity over the administration of justice. It may authorize such investigation to be conducted before one or another judge or referee and empower him to subpoena persons to testify (see *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465). When a lawyer is so subpoenaed, h is under the same obligation as any other witness and may

assert the same rights and privileges, including the privilege against self-incrimination (see *People ex rel. Karlin v. Culkin, supra*).

But the additional power which the Court may exercise over lawyers permits the Court to authorize or institute disciplinary proceedings against an attorney, who in the course of the investigation commits such acts or revealed to have committed such acts as constitute evidence of unfitness to practice law. Such acts include misconduct toward clients or courts, such as embezzling funds, improper solicitation, or gross contempt of court, and conviction of a felony or other crime involving moral turpitude.

In the absence of such acts and evidence to establish them, the Court has no disciplinary power. The refusal of the lawyer to incriminate himself is not such an act, even if the Court sincerely deems such refusal an impediment to its investigation. The showing must be made that the lawyer committed some act which he had no right to commit. Short of that, the lawyer is in the same position as the layman-witness who in the view of the Court is not as helpful as the Court might wish; greater responsiveness cannot be coerced by threatening the loss of professional status and livelihood.

It must be remembered that the Court is acting as licensor and in its judicial capacity at the same time. It is dealing with the profession which it may regulate, but which it must allow to remain independent.

It will not do for the licensing court to be given total procedural leeway, subject to review on the question of abuse in particular cases. While widespread intimidation is unlikely, there is always the chance that the exigencies of a particular inquiry or of a particular public clamor will lead to acts which will have the effect of harassment even if an ultimate order of disbarment or suspension does not result.

The power to act is therefore carefully circumscribed (*Cammer* v. *U. S.*, 350 U. S. 399). It depends upon an act of misconduct, a breach of the applicable laws, rules, regulations or canons, stated and proved in conformity to law, and under a procedure adhering to the standards of due process guaranteed by the Fourteenth Amendment.

## CONCLUSION

**The judgment disbarring petitioner should be reversed.**

Respectfully submitted,

DAVID SCRIBNER,
154 Nassau Street,
New York, New York,
*Counsel for National Lawyers Guild as Amicus Curiae.*

ABRAHAM UNGER,
HERMAN B. GERRINGER,
JONATHAN GOLDBERG,
*of Counsel.*